



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

February 3, 2003

Mr. Thomas H. Fowler  
Assistant County Attorney  
Grayson County  
200 South Crockett, Suite 116A  
Sherman, Texas 75090

OR2003-0703

Dear Mr. Fowler:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175868.

The Grayson County Sheriff's Office (the "sheriff") received a request for information relating to a former employee. You indicate that the sheriff has no information that is responsive to some aspects of the request. Chapter 552 of the Government Code does not require the sheriff to release information that did not exist when he received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). The sheriff claims that all of the information held by his office that is responsive to the request is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.1175 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that the sheriff has asked the requestor to clarify one aspect of this request for information. *See* Gov't Code § 552.222(b) (if what information is requested is unclear to governmental body, it may ask requestor to clarify request); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with requestor to clarify or narrow request for information toll its ten-business-day deadline to request decision under Gov't Code § 552.301(b)). As you do not indicate that the sheriff has received a response to his request for clarification, he need not respond to that aspect of the request for information at this time. At such time, however, as the requestor provides clarification, the sheriff must request a decision from this office with regard to any further information that he seeks to withhold. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000).

We next note that the sheriff did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) provides in part:

(e) A governmental body that requests an attorney general decision . . . must . . . not later than the 15<sup>th</sup> business day after the date of receiving the written request [for information]:

(1) submit to the attorney general:

...

(B) a copy of the written request for information.[.]

Gov't Code § 552.301(e)(1)(B). Section 552.302 provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."

This office has not received a copy of the written request for information. Thus, the sheriff has not complied with section 552.301 of the Government Code in requesting this decision. Therefore, the requested information is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of that information from the public. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome by a demonstration that the information is confidential by law or that third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. In this instance, the sheriff raises sections 552.101, 552.102, 552.117, and 552.1175 of the Government Code. As these exceptions can provide compelling reasons for non-disclosure under section 552.302, we will address the sheriff's claims.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of the Form I-9 that we have marked under chapter 552 of the Government Code would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the Form I-9 is confidential under section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 1701.454 of the Occupations Code also appears to encompass some of the requested information. Chapter 1701 of the Occupations Code is applicable to the Texas Commission on Law Enforcement Officer Standards and Education. Section 1701.454 provides as follows:

(a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this section, a commission member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the commission employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by the commission that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Occ. Code § 1701.454. In this instance, the requested information includes two Form F-5's. We have marked these documents. Assuming that these documents were submitted to the commission, they are excepted from disclosure in their entireties under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

The submitted documents also include information that is subject to the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. The MPA governs the disclosure of medical records. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. *See* Open Records Decision No. 598 (1991). We have marked the submitted information that is governed by the MPA. The sheriff must not release that information unless the MPA permits him to do so.

The sheriff also raises section 552.101 of the Government Code in conjunction with constitutional and common-law rights of privacy. Constitutional privacy protects two kinds of interests. *See* Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See* Open Records Decision No. 455 at 3-7 (1987); *see also Fadjo v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See* Open Records Decision No. 455 at 6-7 (1987); *see also Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985), *reh'g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). The application of this aspect of constitutional privacy requires a balancing of the individual's privacy interest against the public's interest in the information. *See* Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). We have reviewed the rest of the submitted information and conclude that none of the information is protected by constitutional privacy under section 552.101.

Common-law privacy under section 552.101 protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary

sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. See Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 594 at 4-5 (1991) (results of employee drug testing), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 394 at 4-5 (1983) (identities of juvenile offenders), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

Section 552.102 of the Government Code, which the sheriff also raises, excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102(a) is applicable to information that relates to public officials and employees. The test of privacy under section 552.102(a) is the same as the common-law privacy test under section 552.101. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.). However, because of the greater legitimate public interest in information relating to public officials and employees, privacy under section 552.102(a) is confined to information that reveals "intimate details of a highly personal nature." See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Thus, privacy under section 552.102(a) is "very narrow." See Open Records Decision No. 400 at 5 (1983).

In this instance, the rest of the submitted information relates to the employment history and job performance of a public employee. We therefore conclude that none of this information is protected by common-law privacy under sections 552.101 or 552.102. See also Open Records Decision Nos. 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of public employees, particularly those involved in law enforcement), 423 at 2 (1984) (statutory predecessor to section 552.102 applicable when information would reveal intimate details of highly personal nature), 400 at 5 (1983) (statutory predecessor to section 552.102 protected information only if release would lead to clearly unwarranted invasion of privacy).

The sheriff also raises section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or

552.1175. Section 552.117(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We have marked the information that the sheriff must withhold under section 552.117 if it relates to a peace officer as defined by article 2.12 of the Code of Criminal Procedure.

In the event that section 552.117(2) is not applicable to the marked information, it may be excepted from disclosure under section 552.1175. This exception provides in part:

(a) This section applies only to:

...

(2) county jailers as defined by Section 1701.001, Occupations Code[.]

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

If the individual who is the subject of the submitted information is a county jailer as defined by section 1701.001 of the Occupations Code, then the information that we have marked comes within the scope of section 552.1175. You do not state, however, nor do the submitted documents indicate, whether the individual in question elected to keep the marked information confidential in accordance with section 552.1175(b). Nevertheless, if the marked information is not excepted from disclosure under section 552.117(2), the sheriff must withhold that information if the individual to whom the information pertains elected confidentiality for the information in accordance with section 552.1175.

If neither section 552.117(2) nor section 552.1175 is applicable to the marked information, the sheriff may be required to withhold the information under section 552.117(1) if the former employee to whom the information pertains timely requested confidentiality for the information under section 552.024. Whether a particular item of information is protected by section 552.117 must be determined at the time that the governmental body receives the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, if the

former employee requested confidentiality for the marked information under section 552.024 before the sheriff received the request for the information, then the sheriff must withhold the marked information under section 552.117(1). The sheriff may not withhold the marked information under section 552.117(1) if the former employee did not make a timely election under section 552.024 to keep the information confidential.

A social security number also may be excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number pursuant to any provision of law enacted on or after October 1, 1990. *See Open Records Decision No. 622 at 2-4 (1994)*. It is not apparent to this office that the former employee's social security number is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the sheriff to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security number in question was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See Gov't Code §§ 552.007, .352*. Therefore, before releasing a social security number, the sheriff should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

We also note that section 552.130 of the Government Code is applicable to some of the submitted information. Section 552.130 excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). We have marked Texas driver's license information that the sheriff must withhold under section 552.130.

Lastly, we note that some of the remaining information is copyrighted. An officer for public information must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See Attorney General Opinion JM-672 (1987)*. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 at 8-9 (1990)*.

In summary, the Employment Eligibility Verification Form I-9 is confidential under section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system. The Form F-5's are excepted from disclosure under section 552.101 in conjunction with section 1701.454 of the Occupations Code if they were submitted to the Texas Commission on Law Enforcement Officer Standards and Education. The sheriff must not release the information that is

governed by the MPA unless the MPA permits him to do so. The home address and telephone number, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, must be withheld under section 552.117(2) regardless of whether the peace officer complies with sections 552.024 or 552.1175. The sheriff may also be required to withhold this same information under section 552.1175 if it relates to a county jailer under section 1701.001 of the Occupations Code and if the person to whom the information relates elected to keep the information confidential in accordance with section 552.1175. This same information may also be excepted from disclosure under section 552.117(1) if the person to whom it relates made a timely election under section 552.024 to keep the information confidential. A social security number may also be excepted from disclosure under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The Texas driver's license information must be withheld under section 552.130. The sheriff must release the rest of the submitted information, complying with copyright law in doing so.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

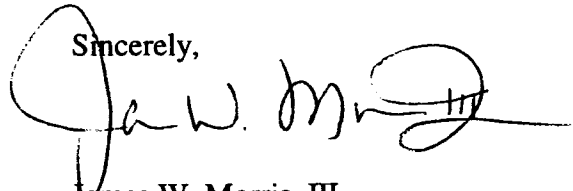


If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris III', with a large, stylized initial 'J' and a long horizontal stroke extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 175868

Enc: Marked documents

c: Mr. Timothy Grey  
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(w/o enclosures)